Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

EDWARD ELIOT KRAMER
Petitioner
v.
GWINNETT COUNTY GEORGIA,
R.L. "BUTCH" CONWAY,
PRISON HEALTH SERVICES INC., and
DWANA GEBHARDT
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

EDWARD ELIOT KRAMER
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May 4, 2005

QUESTIONS PRESENTED

1. **If the contents, claims, exhibits, affidavits and references stated in a movant's Motion for Summary Judgment, taken together, would suffice as the Motion Respondent's traverse and showing of material facts and facial controversies precluding Summary Judgment, even if the Motion Respondent's own response is itself insufficient, should the Court Deny the Motion for Summary Judgment?**

LIST OF PARTIES

Petitioner **Edward Eliot Kramer,** is a resident and citizen of the State of Georgia and of the United States of America.

Respondent Real Party in Interest **Gwinnett County Georgia** was at all pertinent times, a County located in the State of Georgia, United States of America.

Respondent Real Party in Interest **R.L. "Butch" Conway** was at all pertinent times, an employee of the County of Gwinnett, Georgia, a resident and citizen of the State of Georgia and of the United States of America.

Respondent Real Party in Interest **Prison Health Services, Inc.,** was at all pertinent times, a business entity operating within and contracted to Gwinnett County, in the State of Georgia.

Respondent Real Party in Interest **Dwana Gebhardt** was at all pertinent times, a resident and citizen of the State of Georgia and of the United States of America.

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IN THE SUPREME COURT
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October Term, 2004

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May 4, 2005

Petitioner respectfully prays that a writ of certiorari issue to review the Decision entered herein by the United States Court of Appeals for the Eleventh Circuit, on February 4, 2005.

OPINIONS BELOW

The 2/4/05 Memorandum Decision of the Eleventh Circuit United States Court of Appeals on Petition for Rehearing appears as Appendix A. The decision of the Eleventh Circuit United States Court of Appeals 8/23/05 appears as Appendix B. The Judgment of the United States District Court, Northern District of Georgia, Atlanta Division in Civil Action No. 1:02-cv-2124-ODE dated 3/5/04 appears as Appendix C.

JURISDICTION

The Memorandum Decision of the Eleventh Circuit United States Court of Appeals on Petition for Rehearing was entered on 2/4/05. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

(c) Motion and Proceedings Thereon. (Pertinent excerpt)

".....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....."

(e) Form of Affidavits; Further Testimony; Defense Required. (Pertinent excerpt)

".....When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

STATEMENT OF THE CASE

Originally, Federal Rule of Civil Procedure 56 was employed to preserve a litigant's right to proceed to evidentiary trial if only a "scintilla" of evidence existed showing that a genuine question of material fact had been set forth prior to trial.[1] That laudable balance was usurped by a trio of cases which tipped the prior balance in favor of pre-trial dismissal.[2] Since that trio, Federal Courts have aggressively sought to reduce their trial caseload by Summary Judgment, when a respondent to a Motion for Summary Judgment failed to satisfy certain technical rules of pleading. Arguably, the premature termination of many real cases, having real issues and an evidentiary probability of trial success, because of contemporary interpretation of Summary Judgment procedures, has denied justice to a large number of litigants.[3]

The instant civil case deals with a question of "deliberate indifference" to the serious medical needs of a pre-criminal-trial incarcerated prisoner, Plaintiff/Petitioner herein, rising to a constitutional level of severity.

In the U.S. District Court, Defendants Moved for Summary Judgment, and than attacked Petitioner's Summary

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[1] **Armco Steel Corp. v. Realty Inv. Co.,** 273 F.2d 483,, 484 (8th Cir. 1960) Cited in 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE Section 2532 at 307 (1995)

[2] **Celotex. V. Catrett**, 477 U.S. 317, (1986), ***cert. denied***, 484 U.S. 1066 (1988); **Anderson v. Liberty Lobby, Inc**., 477 U.S. 242 (1986); **Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,** 475 U.S. 574 (1986) , these three cases referred to hereinafter as the "trio".

[3] Generally, see: ROBERT J. GREGORY, **"One too many rivers to cross: Rule 50 practice in the modern era of Summary Judgment",** Florida State University Law Review, 1996, http://www.law.fsu.edu/journals/lawreview/frames/233/gregtxt.html

responsive pleadings as unsworn or unverified, thereby partially stripping Petitioner's factual basis.

However, the substance of the original claims reside in one basic exhibit, the jail's detailed inmate records, including medical records, which both Petitioner and Respondents identically presented in their Summary Judgment submissions. Petitioner's was not verified, and was stricken. But Respondents' verified copy was admitted. Respondents argued on Summary Judgment that the striking of unsworn factual elements of Petitioner's Summary Judgment response was fatal, and the trial court granted Summary disposition, even though the factual jail record, encompassing the lawsuit's clear medical justification, was by Respondent's own action, a matter of record.

The District Court therefore had before it a Respondent's Summary Judgment Motion which contained the facts and avowals necessary to the Court's denial of the motion.

STANDARD OF REVIEW

Dismissal of a case by Summary Judgment when the trial court has before it movant-submitted facts sufficient to deny the dismissal, is a matter of abuse of discretion.

STATEMENT OF FACTS

Petitioner was arrested and booked at Gwinnett County Detention Center (GCDC), Georgia on 8/25/2000, where he was incarcerated as a pre-trial detainee until November 6, 2000, and again from November 16, 2000 until January 24, 2001; during middle November, he bonded out.

Following Petitioner's initial bond hearing, Gwinnett Superior Court Judge Debra K. Turner requested a statement from his rheumatologist. The physician's letter, faxed to the jail's administrator under Judge Turner's own cover concluded: "Mr. Kramer is at risk for severe, recurrent, skin infection, complication of arthritis, including blood borne

seeding of diseased joint, which would be disastrous. I recommend evaluation and appropriate management of his arthritis and skin disease." A copy was also filed with Prison Heath Services, Inc. (PHS) and placed in Petitioner's medical jail records.

Throughout his nearly five month detainment in the jail, Petitioner alleges violations of his Civil Rights for deliberate indifference to his serious medical needs by Respondents, together and severally, for failing to provide him with minimally prescribed medications and tests, adequate and timely treatments for acute medical needs, and access to appropriate medical interventions for his worsening conditions. [4]

Petitioner is now in his sixth year of intensive home incarceration - without the benefit of a trial. Since his release to home incarceration in January, 2001, he has received over 850 additional medical treatments, yet his conditions have not returned to his pre-jail state; some never will. Spinal surgery in May, 2001 indicated scarring to Petitioner's spinal cord; a direct result of injuries sustained at GCDC.

The facts supporting characterization of Defendants' misconduct are as "deliberate indifference" were presented to the District Court by Defendants themselves, when they included as exhibit to their Motions for Summary Judgment, the complete, verified, voluminous jail records of Defendant. Regardless of whether Defendant followed responsive requirements properly, the record before the District Court contained the vital factual elements, regardless of source, to

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[4] In 1998, the American Medical Association (AMA), adopted a standard definition for "Treatment" to address the growing problem of managed health companies attempting to insert egregious definitions of medical necessity (CMS Report 13, I-98). It provides a baseline reference for all medical professionals: "Health care services or products that a prudent physician would provide to a patient for the purpose of preventing, diagnosing, or treating an illness, injury, disease or its symptoms in a manner that is:
(a) in accordance with generally accepted standards of medical practice;
(b) clinically appropriate in terms of type, frequency, extent, site and duration
(c) not primarily for the convenience of the patient, physician, or other health care provider."

determine existence of a massive, serious factual controversy meriting denial of summary judgment.

In particular, the District Court's grant of summary judgment was based upon that court's wrongful characterization of each of Petitioner's serious, and facially evident, factual grounds as sounding in possible medical malpractice, or other, less than constitutional-magnitude bases. Survival of any of the multiple claims alleging "deliberate indifference" would have entitled Plaintiff to his right to present such claims to the jury.

Material factual controversies, instances of "deliberate indifference" to Petitioner's serious medical needs were at issue, and supported by the jail records submitted on summary judgment by the movant Defendants themselves. PHS staff and the jailers were advised through written prescription and by personally listening to doctors' testimony, of medical requirements for daily ingestion of certain specific medications, including Arava. They refused to provide such medication except as to a short-term initial dose, because the Defendants considered the prescriptions "too expensive." PHS staff and the jailers claimed to be unaware, through inadvertence, of specific doctor requirements of "follow up" diagnostic or treatment doctor visits. Similarly, Defendants refused to permit Plaintiff the use of a readily available jail bathtub for the purpose of prescribed daily long-continuous-contact medicinal bathing. Expressly prescribed and court-ordered use of orthopedic bedding following a documented spinal cord injury was continuously denied in violation of the court order, and Defendant was, on an arguably punitive basis, assigned to sleep on the bare floor of his cell. These and other consistent denials of health mandated, doctor prescribed treatments ***singly, and in combination,*** clearly rise to the constitutionally valid claim of "deliberate indifference." [5]

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[5] These instances of "deliberate indifference" are misleadingly described as lesser-significance matters in the District and Appellate rulings appearing hereinafter as Exhibits A, B, C.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The District Court had before it on summary judgment, a sufficiently complete medical and jail record, albeit properly submitted by the Defendants seeking dismissal, an identical version of which submitted in support of his defense against summary judgment by Petitioner was stricken for his technical violation regarding verification.

The elements of a true "deliberate indifference" claim were therefore clearly before the District court, and were justiciable, individually and cumulatively.

That some of these elements could possibly also sound under additional theories of liability, such as "medical malpractice," does not render them insufficient as constitutional deprivations sounding in "deliberate indifference."

1.

Because the contents, claims, exhibits, affidavits and references stated in the movant's Motion for Summary Judgment, taken together, would suffice as the Motion Respondent's traverse and showing of material facts and facial controversies precluding Summary Judgment, even if the Motion Respondent's own response is itself insufficient, the Court must Deny the Motion for Summary Judgment.

The Petitioner should have been routinely, and mandatorily, allowed to proceed with his constitutional tort claims before a jury where, manifestly, he had a substantial prospect of success. While any one of the factual issues stands to preserve Petitioner's right to a jury trial, the suffering by Plaintiff cumulatively resulted from all of these factual matters, making their combination during a single prolonged incarceration more painful and medically harmful then their mere totality.

1a.

Failure to supply prescribed medication, or substitution of less effective or ineffective medications because of cost, rises to the level of deliberate indifference.

Arava, the form of chemotherapy prescribed by Petitioner's rheumatologist, is classified as a disease-modifying antirheumatic drug (DMARD), and was approved by the Food and Drug Administration (FDA) in 1998 for the treatment of psoriatic arthritis. Unlike other medications that can help relieve pain and swelling, Arava was the only FDA-approved drug shown to slow the progression of joint damage caused by psoriatic arthritis.

Petitioner's Arava stopped when the first prescription was depleted.[6] PHS's own medication logs reflect that the Arava lapsed for many, many weeks.[7] He was shown a bill by Defendant Gephardt who indicated that "we mistakenly paid for the first installment of the first dosage without realizing how much it was and we're not going to do this again."[8]

There was no medication or treatment provided to Petitioner for his arthritic condition in place of his discontinued Arava. On January 11, 2001, Petitioner's rheumatologist again documented to the jail that his psoriasis was poorly controlled, and that there was non-compliance concerning prescribed medications, including Arava.[9] Denial to him of a second or subsequent batch of Arava because of its expense, despite his critical need, wrongly arose from non-medical and unjustified money concerns.[10]

Discontinuation of Petitioner's prescribed, unique treatment for severe psoriatic arthritis as a purely cost-controlling decision, providing him no functionally

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[6] R3-43 at Exh A, Med Rec Pg. 49, 65, 95

[7] id. R3-43 at Exh A, Med Rec Pg. 49, 65, 95

[8] Doc 45 - Pg 190

[9] R3-43 at Exh A, Med Rec P. 194

[10] Doc 45-Pg 190

equivalent alternative treatment for his worsening arthritic condition rises to the constitutional level of "deliberate indifference".

1b.

Failure to follow up vital specialist doctor visits and appointments because of cost, rises to the level of deliberate indifference.

Seven days after PHS physician Fajardo's urgent request for Petitioner to be seen by an outside specialist, GCDC transported Petitioner to see a PHS-designated dermatologist, who recorded in his medical records that 80% of Petitioner's body was riddled with psoriatic lesions[11] and wrote a treatment plan for medicated daily baths and a follow-up appointment in ten days.[12] Despite her denials, evidence exists that Respondent Dwana Gebhardt, employed as PHS medical administrator at the jail, was aware of, yet failed to implement, a follow up medical examination for the ***de facto*** reason of the jail's money-limitation policies.

On September 29th, Petitioner was permitted to see his own rheumatologist, who documented back to the jail on that day that his psoriasis was "poorly controlled and riddled with secondary hemorrhagic excoriation," and that cellulitis" (acute inflammation and swelling) in his legs put him at "high risk for subsequent infection," which would further aggravate his arthopathy (joint disease). The physician's orders to the jail included the drug Arava, access to sanitary conditions, daily medicated baths, regular laboratory

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[11] The Psoriasis Area and Severity Index (PASI) used by dermatologists as standard for measurement of psoriatic involvement denotes that under 2% is mild, between 3% and 10% to be moderate, and over 10% to be severe. While untreated for his condition at GCDC, Petitioner's psoriasis affected over 80% of his body - 8 times worse than "severe." Widespread psoriatic lesions are considered life-threatening, and complications from such account for about 400 deaths annually, according to the National Psoriasis Foundation.

[12] R3-43 at Exh A, Med Rec Pg. 36

monitoring and dermatologist follow-up. These orders were knowingly ignored and refused by Respondents.

Despite the dermatologist's order for "follow up" and the rheumatologist's order for "dermatologist follow-up," the reason why Petitioner was not returned for psoriatic treatment until over 2 months later is revealed in the Defendant-authenticated medical records: an unsigned PHS Utilization Management Decision (#10451562) clearly indicates that he was "authorized" for only one "Op Dermatology Referral" for a 60 day period. Utilization Review monitors healthcare costs for a given patient.

Thus an independent ground for a finding of "deliberate indifference" is the documented failure of Defendants to transport Petitioner to his documented 10-day follow-up for "urgent" medical care, as well as their failure to provide the medication and bath regimen required by the doctors and specialists.

1c.

Denial to Petitioner of prescribed medical use of an available ordinary bathtub in jail, rises to the level of deliberate indifference.

Several independent physicians to whom the jail authorities transported Petitioner, **prescribed** early in the incarceration, the once or twice daily **taking of medicated baths**. Defendants were fully aware of this medically essential prescription. Despite ready availability of an ordinary bathtub (albeit equipped with wheels for mobility) within the jail, Defendants **absolutely ignored and denied** Petitioner's use of any bathtub, for the entirety of the incarceration.

Defendants have alleged in pleadings, that they provided a functional equivalent to a bath, that is, a shower and medicated soap within the jail. That equivalency is false.

First, the five months of incarceration involved almost zero opportunities for Petitioner to shower, and except for provision of less than a total of five days' worth of

any type of medicated soap, medicated shower-washing opportunity was essentially nonexistent.[13]

Second, **a shower is not the functional equivalent of a bath**. In a bath, dissolved medication in a limited volume of water maintains a continuous contact with every submerged portion of the body's exterior. Dissolved medication therefore has a period of time with which to interact with diseased skin, in Petitioner's instance covering 80% of his body surface area. A shower, on the other hand, is a continuous draining of freshly dispensed water from the shower head onto a portion of the body, from which it drains almost immediately, is lost in the shower drain, and is replenished with freshly sprayed non-medicated water. Obviously, a small bar of medicated soap is quickly washed away by a continuous shower, and loses its continuous-skin-contact value, especially when access to the medication is almost continuously denied. Conway and the jail staff were aware of their bathtub. PHS physician Majoch knew about the available bathtub; so did PHS administrator Gebhardt.[14]

Defendants alleged that the existing jail mobile bathtub was barred to Plaintiff because said ordinary bathtub was also available for infrequent in-jail Christian Baptisms. The bathtub had neither been consecrated nor dedicated to religious usage, and was capable of being cleaned and disinfected by conventional washing.[15]

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[13] On December 20, nearly 4 months after initially prescribed, Petitioner received two bars of Aveeno soap from a PHS nurse. The attached permission form from PHS physician Schied noted: "Once these 2 are gone order is finished." (Original is double-underlined) The prescribed bars lasted less than 5 days and the prescription was never refilled.

[14] Doc 63-Pg. 10; Doc 62-Pgs 74-75, 88

[15] Defendants' unfounded distinction between religious and non-religious usage of the common jail bathtub manifestly caused Petitioner deliberate and unnecessary pain, suffering, and general health deterioration. The U.S. Supreme Court mandates "The government must pursue a course of complete neutrality toward religion." **Wallace v. Jaffree**, 472 U.S. 38 (1985). Appellees' position that the portable, non-sacred bathtub was a "baptismal pool" and thus restricting its use from Petitioner, who is Jewish, for religious reasons, arguably violates the **Religious Land Use**

Defendants knew that they were intentionally violating a court order as well as multiple prescriptions by physicians, requiring daily medicinal bathtub soaking. Defendants' five-month denial of critically needed medicinal baths despite their physical ability to provide the baths, rises in this case to constitutional level of deliberate indifference.

Id.

Denial to Petitioner of prescribed, court-ordered orthopedic bedding following a documented spinal column injury, was wrongfully ignored in lower court proceedings, and rises to the level of deliberate indifference.

Instead of complying with a court order that Petitioner be supplied in the jail with prescribed, court-ordered orthopedic bedding. Respondents in a retaliatory manner, assigned Petitioner to sleep on the floor without the prescribed bedding. Contrary to the Appellate court's rejection of this element as not having been supported prior to Appeal, this argument was repeatedly brought forth and substantiated throughout Petitioner's action.

As noted in the Petitioner's original Appeal brief, Petitioner's rheumatologist on October 18, 2000 documented the neck pain to Respondents as "consistent with cervical radicular symptoms" (associated with severe trauma), and prescribed for him cervical support and bedding. It further notes that at a November 6, 2000 hearing, he testified before Judge Turner that an MRI indicated that new damage had occurred to Petitioner's C6-C7 vertebrae and "if left untreated, could result in permanent paralysis (loss of function of anything below the level of the neck)."[16]

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and Institutionalized Persons Act (RILUPA) enacted by Congress on July 27, 2000. Reverend Thomas Coley's affidavit on record in proceedings below states: "It is my observation that, whenever (Petitioner) made requests for routine assistance, he received intimidating responses, gestures and denials because he is Jewish," and further Coley was admonished by an official to stay away from (Petitioner) because "the Sheriff's Department is going to hang that Jewish son-of-a-bitch."

[16] R3-43 at Exh B, Crim Doc Pg 9-10, 15-16

Also noted is Judge Turner's unprecedented Court Order of December 18, 2000, which stated that, "[T]he Sheriff's Department is hereby ordered to accommodate Mr. Kramer's needs in terms of a sleeping facility with a mattress and a pillow, and use of such footwear as required by a physician. Further, the Sheriff's Department shall allow (Petitioner) the opportunity to bathe on a schedule provided by a physician in a written prescription."

Further, the original action notes that on January 11, 2001, Petitioner's rheumatologist documented that he was "still off his medications for the treatment of psoriatic arthritis, his psoriasis remained poorly controlled, and documented continued non-compliance [by Respondents] with prescribed medications and support measures." The "support measures" in his written notes of October 18, 2000, that were returned, mailed and faxed to the jail were the "provision of a cervical pillow and an egg-crate mattress" to stabilize Petitioner's injured cervical spinal column.

Despite the lower court's attempt to strike and ignore the matter of orthopedic bedding, it is amply documented in the record. This issue, too, rises to the serious constitutional magnitude qualifying it as "deliberate indifference."

1e.

Petitioner was entitled to the District Court's review of documents properly within the record for consideration and denial of Summary Judgment

Citing FRCP Rule 56(e), the district court rejected Petitioner's Exhibits 2 and 3, consisting of his GCDC medical records.[17] PHS and Gwinnett County indisputably placed those very same records before the district court regarding summary judgment. The district court reasoned that because Petitioner's earlier attorney failed to authenticate Petitioner's set, he could not "cross-authenticate" them.

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[17] R6-76-10, 11

By refusing to review documents already on record, the district court wrongly suggested that a non-movant is required to match the movant, document-for-document, and witness for witness. This cannot be the accepted standard. The non-movant must submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of a cause of action.[18] That is exactly what Petitioner did.

Petitioner referred the district court to the PHS records, the medications logs, his medical requests, outside specialist's directives, the jail's policy and procedure, and his bond hearing transcript, all within the record.[19] The district court's refusal to review them erroneously resulted in summary judgment, and substantially prejudiced Petitioner's case.

If.

The District Court erred in interpreting the standards of Estelle v. Gamble and Farmer v. Brennan

A pre-trial detainee is entitled to basic necessities as food, living space, **and medical care**, the minimum standard allowed by the Fourteenth Amendment's Due Process Clause is the same as that allowed by the Eighth Amendment for convicted persons.[20]

The perennial framework for deliberate indifference requires that an inmate "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[21] The Eleventh Circuit has explained that the "deliberate indifference" standard has an objective and subjective component.[22]

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[18] See **Malacara v. Garber**, 353 F.3d 393 (5th Cir. 2003)

[19] R5-52, R5-53

[20] See **Lancaster v. Monroe County, Ala.**, 116 F.3d 1419, 1425, ftn 6 (11th Cir. 1997)

[21] **Estelle v. Gamble**, 429 U.S. 97, 106, 97 S.Ct 285, 50 L.Ed. 2d 251 (1976)

[22] See **Farrow v. West**, 320 F.3d 1235, 1243 (11th Cir. 2003)

The district court assumed that Petitioner's psoriatic and arthritic condition was a serious medical need. [23]It was.

A serious medical need requires an objective finding, "[one] diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." [24]

The record evidences serious medical needs. PHS's own physician found Petitioner's condition "severe" [25] , the worst psoriasis that he had ever seen, [26] and requiring "urgent expert care." [27] Lesions had become open, bleeding pustules, and the psoriatic arthritis was affecting every part of Petitioner's body. [28] Petitioner was also suffering from a painful lesion on his spine, [29] for which he received surgery only after release from jail on home detention.

The Eleventh Circuit has "consistently held that knowledge of the need for medical care and intentional refusal to provide that care constitutes deliberate indifference."[30] A claimant need not show that a jail official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.[31] Since a finding of deliberate indifference requires a finding of the Defendant's subjective awareness of the relevant risk, a genuine issue of material fact exists only if the record contains evidence, albeit circumstantial of such subjective awareness.[32]

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[23] R6-76-15

[24] **Hill v. DeKalb Reg'l Youth Det. Ctr.**, 40 F.3d 1176, 1186 (11th Cir. 1994)

[25] Doc 43 at Exh A, Med Rec at pg.55

[26] Doc 63- Pg 5, 7,9,36

[27] Doc 43 at Exh A, Med Rec at Pg 29

[28] Doc 45 -Pg 57, 108

[29] R3-43 at Exh B, Crim Doc Pg 15-16

[30] **Hill**, supra, footnote 24, at 1186

[31] **Farmer v. Brennan**, 511 U.S. 825, 832, 114 S.Ct 1970, 128 L.Ed. 2d 811 (1994)

[32] **Steele v. Shaw**, 87 F.3d 1266, 1269 (11th Cir. 1996)

Petitioner had atypical, continuous medical problems for which he submitted many medical requests. In addition, he sustained a severe cervical spine injury while at the jail. He concedes that he saw PHS physicians and nurses several times, [33] and outside help on many other occasions.[34] Yet the district court erroneously allowed the sheer number of medical visits to mask Appellees' wrongdoing. Petitioner had multiple prescriptive professional orders, but Appellees deliberately ignored most of these orders.

> "**Gamble** does not necessarily excuse one episode of gross misconduct merely because the overall pattern reflects general attentiveness. The issue is whether the questioned conduct is cruel and unusual because it involves deliberate indifference, or something more than a medical judgment call, an accident, or an inadvertent failure" [35]

This case bears a striking resemblance to the case of **Washington v. Dugger**, 860 F.2d 1018 (11th Cir. 1988). In **Washington**, as here, the jail claimant suffered from lesions, and open and bleeding pustules. In that case, as here, the jail doctors told the claimant that due to the complexity of his disease, they were unable to treat him and would arrange outside help. In that case, as here, the claimant repeatedly requested treatment. In that case, as here, the jail staff transported the claimant, and received the specialist's medical orders. In that case, as here, the jail and medical provider failed to follow important directives, insisting instead that there was a mere disagreement about modes of care. The Eleventh Circuit rejected that defensive argument in **Washington**, and should have rejected that same defensive argument here.

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[33] R6-76-15

[34] See Doc 45- Pg 150, 226-227

[35] **Murrell v. Bennett**, 615 F.2d 306, ftn 4 (11th Cir 1980)

1g.

Gebhardt's conscious misconduct rises to the constitutional level of deliberate indifference

With sufficient facts and inferences of a serious medical need, the question becomes what administrator Gebhardt knew, when did she know it, and did she deliberately disregard it. [36] These are state-of-mind questions for the jury, and inappropriate for summary disposition.

Gebhardt had reason to know about the second, missed dermatologist appointment, because of her likely receipt of the message requiring a 10-day follow-up transmitted to her by the person who took Petitioner to the first appointment, and returned him to jail. After the 10th day, Petitioner repeatedly urged Gebhardt to investigate and set up a quick visit to replace the missed one. She promised him to check on it, [37] but did not do so (or even if she did, she refused to spend money on such a visit.)

Gebhardt knowingly allowed the lapse of the chemotherapeutic drug, Arava. Even after reading Petitioner's medical records and hearing Dr. Parris testify that Petitioner required Arava, Gebhardt viewed Arava too expensive for PHS to fund.

In **Washington**, supra, the Eleventh Circuit found it significant that the respondent failed to acquire a certain oral medication and certain daily bath medication understood to help the inmate's pain. Similarly, Gebhardt knew about the necessary and aggressive medication that Petitioner needed to treat his psoriatic arthritis. Notwithstanding this, she withheld it. Granting of summary judgment was therefore improper on this issue alone.

Gebhardt, as shown in Respondent's submitted complete jail records, failed to coordinate or provide Petitioner's prescribed use of the available bathtub, another

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[36] See Generally, **H.C. by Hewitt v. Jarrard**, 786 F.2d 1080 (11th Cir. 1988), and **Washington**, Supra.

[37] Doc 45-Pg 196

independent ground why summary judgment should have been denied.

Gebhardt knowingly failed to obtain or provide the Court-mandated and physician-ordered cervical relief (orthopedic) bedding, even though, in her position, she was subject to the court order, and it was readily obtainable through PHS. Further, she failed to provide the ordered neurosurgical consultation while Petitioner was an inmate. Ultimately, he required after his release, an anterior cervical discetomy and fusion as result of jail injuries in June 2001, to avert complete paralysis from the neck down. This is yet another reason why summary judgment was inappropriate.

1h.

PHS Facilitated a de facto policy that harmed Petitioner.

PHS can only be liable for their official policies or customs at the jail that violate an inmate's constitutional rights.[38] Liability can be established by pointing to an official policy or a widespread practice or custom that, although not authorized by express municipal policy, is so settled and permanent that it takes on the force of law. [39] A claimant may show that a certain course of action is so prevalent in the day-to-day business of the jail that it has become a ***de facto*** policy or custom.[40]

Contrary to legal authority, PHS carried out a ***de facto*** policy of delay and denial of necessary treatment because of money.

> "Delay in medical treatment cannot be justified as a means to coerce payment. Furthermore, if necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out." **Ancata,** Supra

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[38] See **Monell v. Dept of Soc. Servs. Of New York**, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); **Ancata v. Prison Health Services, Inc.**, 769 F.2d 700 (11th Cir. 1985)

[39] **Monell,** supra, footnote 38.

[40] See **City of Canton v. Harris**, 489 U.S. 378, 1009 S.Ct 1197 (1989)

Gephardt requested PHS staff solicit Petitioner's own insurance coverage when he inquired about his overdue dermatology appointment.[41]

They denied him a second batch of Arava because of its expense, despite his critical need.[42] These denials and delays wrongly arose from non-medical and unjustified money concerns, As such, summary judgment was improper.

1i.

Gwinnett County and Conway, by GCDC Staff, carried out Violations of GCDC's own policies, and violation of Court Orders

According to Gwinnett County and Conway, Sheriff Conway is the proper party against whom claims arising out of operation of the GCDC may be brought.[43] Citing Ga. Const. Art. IX, I, section III(a). Additionally, Gwinnett County can be liable for official policies or customs of the jail that violate an inmate's constitutional rights.[44]

By jail written policies and procedures, Gwinnett County and Sheriff Conway controlled jail matters such as clothing, laundry services, and bunk, cell and bedding assignments.[45] The following is required:

> "Inmates must receive clothing and hygiene items to be utilized in maintaining an acceptable level of personal hygiene.
>
> "Each inmate assigned to a housing unit will have access to shower facilities.
>
> "Inmates in administrative segregation will be provided opportunities to shower daily." [46]

Against policy, staff made Petitioner wear unwashed and blood-stained uniforms, sleep in unwashed and blood-

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[41] Doc 45- Pg 158-159, 195-196
[42] Doc 45- Pg 190
[43] R4-46-7,8
[44] See **Monell**, Supra at 691
[45] R4-46 at Exh. B, Pg 2-paragraph 3
[46] R4-46 at Exh. B, Pg. 14-15

stained linens, and stay in a lice-contaminated cell, despite his obvious vulnerable condition.[47] Respondent also contracted methicillin resistant staphylococcus aureus (MRSA) during his incarceration.

Most significantly, they refused Petitioner an available bunk and a pillow, and assigned him a cell floor, despite his obvious pain.[48] Facts show that on October 18, 2000, a deputy obtained Dr. Parris' prescription for Petitioner to get orthopedic bedding and took it back to the jail, but the jail staff did not follow the order.[49] Even the extraordinary measure of Judge Debra K. Turner issuing a judicial order to get Petitioner his requisite bedding, was still to no avail.[50]

These are not random acts or isolated incidents.[51] The sheer fact of a court order to get a bed and pillow, and the sheer fact of violating the court order demonstrates a ***de facto*** policy and custom carried out at the jail. Because a jury could conclude that ignoring a court order constitutes deliberate indifference, summary judgment was improper.

1j.

The District Court erred in ignoring adverse inferences

"Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".[52] The district court has a duty to take all the evidence in the light most favorable to Petitioner herein.[53] Similarly,

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[47] R5-53, Coley Aff paragraph 6

[48] Foster Aff. Paragraphs 6 and 17

[49] Doc 45-Pg 388

[50] R3-43 at Exh A, Med Rec Pg. 166-167

[51] See **Depew v. City of St. Mary's**, 787 F.2d 1498, 1399 (11th Cir. 1986)

[52] **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

[53] See **Steele v. Shah**, 87 F.3d 1266 (11th Cir. 1996)

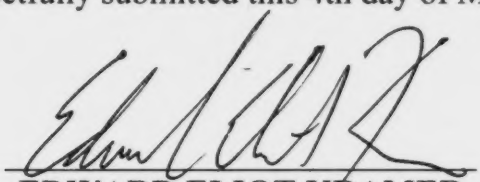
the District Court is required to draw "all favorable inferences."[54]

The district court should have afforded Petitioner the benefit of and inferences from his medical needs, records and directives. Gwinnett County and Conway violated a clear judicial order, the jail's own policy, as well as medical directives for good hygiene and clean conditions, thereby subjecting Petitioner to continual and unnecessary pain. It is ironic that Gebhardt and PHS staff could find Petitioner too sick to treat, elicit outside care, and then prevail on summary judgment without actually following outside directives. The district court's decision sends a horrible message. It tells jails that they may ignore express medical directives. Worse, it tells counties and sheriffs that they may ignore judicial orders directed at them.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should reverse the summary judgment(s) below, and return this case to the district court for jury trial.

Respectfully submitted this 4th day of May, 2005.



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[54] **United States v. Four Parcels of Real Property**, 941 F.2d 1428, 1437 (11th Cir. 1991)

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DATE: February 04 2005

No. 04-11474

EDWARD ELIOT KRAMER
Plaintiff-Appellant
versus
GWINNETT COUNTY, GEORGIA, and
Unknown and unnamed employees,
Contractors and agents of
Gwinnett County,
R.L. BUTCH CONWAY, et.al.,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion - _____, 11th Cir., 19__, ___F.2d____).

Before: ANDERSON, WILSON & COX, Circuit Judges
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:
(E.R. Cox, UNITED STATES CIRCUIT JUDGE

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DATE: August 23, 2004

No. 04-11474
Non-Argument Calendar

D.C. Docket No. 02-02124-CV-ODE-1

EDWARD ELIOT KRAMER
Plaintiff-Appellant

versus

GWINNETT COUNTY, GEORGIA, and
Unknown and unnamed employees,
Contractors and agents of
Gwinnett County,
R.L. BUTCH CONWAY, et.al.,
Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Georgia

(AUGUST 23, 2004)

Before ANDERSON, WILSON and COX,Circuit Judges.

PER CURIAM:

Plaintiff Edward Eliot Kramer appeals the district court's summary judgment for Defendants Gwinnett County, Sheriff R.L. "Butch" Conway, Prison Health Services, Inc., and Dwana Gebhardt, in Plaintiff's 42 bU.S.C. Section 1983 action alleging deliberate indifference to his serious medical needs while an inmate at the Gwinnett County jail. The district court's order granting summary judgment is reported at ***Kramer v. Gwinnett County, Ga.,*** 306 F.Supp.2d 1219 (N.D. Ga 2004). We affirm.

On appeal, Plaintiff contends that the district court erred in two ways: (1) by striking as unauthenticated three of the exhibits attached to Plaintiff's response to the Defendants' motion for summary judgment, and (2) by concluding that the undisputed evidence showed that the Defendants were not deliberately indifferent to Plaintiff's serious medical needs. We discuss these in turn.

We review for abuse of discretion whether the district court erred in striking the exhibits; we will reverse only if the court's ruling was erroneous and created a "substantial prejudicial effect." ***Club Car, Inc. v. Club Car (Quebec) Import, Inc,*** 362 F.3d 775, 780 (11th Cir.2004) (citations omitted). The district court struck three of Plaintiff's exhibits, reasoning that they were neither sworn to nor authenticated, as required by Fed.R.Civ.P. 56. The first of these exhibits, a group of photographs which Plaintiff contends were of his skin condition, was not authenticated by anyone: in the deposition passage Plaintiff cites for authentication, plaintiff's lawyer expressly disavows authentication. Thus, the district court did not abuse its discretion in striking them as unauthenticated. The second two exhibits, papers which plaintiff contends were his jail medical records, were not authenticated by the Plaintiff; if they are indeed his medical records, then they were made part of the record by the Defendants, and were in the summary judgment record. Thus, the plaintiff suffered no prejudice by the district court's refusing to impute the Defendants' earlier authentication of their copy of the records to the Plaintiff's copy.

We review de novo the district court's grant of summary judgment, applying the same familiar standards as the district court. ***Hallum v. Provident Life & Acc. Ins. Co.,*** 326 F.3d 1374, 1375-76 n.1 (11th Cir. 2003). Plaintiff points out four instances in which he contends that the Defendants' (sic) provided him constitutionally inadequate medical care: (1) failing to transport him to a follow-up dermatology appointment on September 30, 2000, (2) discontinuing his prescription for Arava, (3) refusing to allow him to take medicated baths, and (4) failing to provide him adequate bedding. He contends that because these instances show constitutionally inadequate care, the district court erred in entering summary judgment for the Defendants.

First, Plaintiff fails to point to any evidence that any of the Defendants knew of his September 30, 2000, follow-up dermatology appointment, prior to the appointment. Indeed, the evidence he points to shows that he told them of this appointment only after he had missed it. Thus, his missing the appointment could not be grounds for a deliberate indifference claim. ***See Farrow v. West,*** 320 F.3d 1235, 1245 (11th Cir. 2003) ("[A] prison official cannot be found deliberately indifferent ... unless the official knows of and disregards an excessive risk to inmate health...") (internal quotation marks and emphasis omitted).

Second, it is undisputed that Plaintiff's prescription for Arava, an oral medication for Psoriasis, was discontinued, it is also undisputed that Plaintiff was given a comparable alternative medical regimen which he does not contend was medically inadequate. Denying plaintiff his drug of choice is not a violation of his constitutional rights. ***See Hamm v. DeKalb County***, 774 F.2d 1567, 1575 (11th Cir. 1985) ("This evidence shows that Hamm received significant medical care while at the jail. Although Hamm may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.")

Third, though it is undisputed that the plaintiff was not allowed to take baths in the jail's baptismal pool, it is also

undisputed that the jail's medical personnel prescribed and allowed the alternative treatment of showering with medicated soap. Again, though this may not have been Plaintiff's preferred treatment, there is no evidence that it was a constitutionally inadequate substitute.

Fourth, Plaintiff contends for the first time on appeal that the Defendants were deliberately indifferent to Plaintiff's serious medical needs by denying him certain bedding. Because this contention was raised for the first time on appeal, we decline to consider it. ***See Technical Coating Applicators, Inc. v. U.S. Fidelity and Guar. Co.,*** 157 F.3d 843, 846 (11th Cir. 1998)

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Edward Eliot Kramer	)	
Plaintiff	)	**CIVIL ACTION NO.**
vs.	)	
Gwinnett County, Georgia,	)	**1:02-cv-2124-ODE**
R.L. "Butch" Conway,	)	
Prison Health Services, Inc.,)		
And Dwana Gebhardt	)	
Defendants	)	

ORDER

This civil matter, alleging deprivation of Plaintiff's constitutional rights in violation of 42 U.S.C. Section 1983, is presently before the Court on Plaintiff's opposed motions for oral argument on Defendants' motions for summary judgment [## 58, 59], Defendants Gwinnett County and Conway's opposed motion to strike [#55], Defendants Prison Health Services and Gebhardt's opposed motion to strike [#65] , Defendant Conway's opposed motion for leave to file supplemental brief [#73], Defendants Prison Health Services and Gebhardt's opposed motion for summary Judgment [#43] and Defendants Gwinnett County and Conway's opposed motion for summary judgment. [#46].

I. Background

Defendant Prison Health Services, Inc. ("PHS") contracts with Defendant Gwinnett County, Georgia to provide medical care to inmates housed at the Gwinnett County Detention Center ("GCDC"). Defendant Gebhardt is PHS's on-site Health Services Administrator at the GCDC and is responsible for coordination of medical services provided. Defendant Conway is the Sheriff of Gwinnett County, Georgia, and is sued in his official capacity.

Plaintiff was an inmate at the GCDC from August 25, 2000 until November 6, 2000, and then again from November 16, 2000 until January 24th, 2001. On July 31, 2002, Plaintiff brought suit under 42 U.S.C. Section 1983 and 18 U.S.C. section 242 against the current Defendants and five subsequently dismissed individuals to redress certain wrongs which were alleged to have occurred during Plaintiff's incarceration at the GCDC. On August 2, 2002, Plaintiff filed an amended complaint that, at seventy-four pages and 209 paragraphs, was substantially similar to the original complaint filed on July 31. In response to the two defense motions for a more definite statement, this Court found Plaintiff's amended complaint stated claims for violation of at least three constitutional rights under Section 1983 and attempted to state a claim for assault and battery under a criminal statute, 18 U.S.C. Section 242. (Order, October 3, 2002 at 4.)

By stipulation of the parties, the five aforementioned individual defendants were dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(ii) on January 6, 2003. Subsequent to this dismissal, the two pending defense motions for summary judgment were filed seeking dismissal of all of Plaintiff's claims. Plaintiff's responses to Defendants' motions for summary judgment were for the most part wholly unresponsive to Defendants' arguments, and contained only one heading labeled "deliberate indifference," which is a reference to Plaintiff's Section 1983 claim for deliberate indifference to Plaintiff's serious medical needs. Although Plaintiff's responses make passing reference to an Eighth Amendment cruel and unusual punishment claim, Plaintiff fails to tie said claim to any Defendant currently before the Court. [1]

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[1] Furthermore, the Eighth Amendment is inapplicable to pretrial detainees such as Plaintiff. **Hamm v. DeKalb County**, 774 F.2d 1567, 1572 (11th Cir. 1985). Any claim related to Plaintiff's treatment would have to be brought under Fourteenth Amendment Due Process. **Id.**

Local Rule 71B provides that failure to file a response to a party's motion "shall indicate that there is no opposition to the motion." N.D. Ga. R. 7.1B. Rule 7.1B requires not just that a party generally "respond" to a motion but mandates that a party respond to each portion of a motion. ***See Witter v. Delta Airlines, Inc.,*** 966 F.Supp. 1193, 1200 (N.D. Ga. 1997). Consequently, a party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed. ***Welch v. Delta Airlines, Inc.,*** 978 F.Supp. 1133, 1148 (N.D. Ga., 1997) ("[U]nder Local Court Rule 7.1 of the United States District Court for the Northern District of Georgia, factual and legal claims to which there is no response should be treated as unopposed."). Having failed to respond to many of Defendants' arguments and having defended only his Section 1983 claim for deliberate indifference to a serious medical need, Plaintiff is found to have abandoned all other asserted claims. Accordingly, the only claim remaining on summary judgment is Plaintiff's claim for constitutionally inadequate medical care. [2]

II. Facts

For the most part, the Court draws the facts from Defendants' statements of undisputed material facts. In accordance with Local Rule 56.1B(1) both sets of Defendants, with their motions for summary judgment, filed a separate, numbered statement of undisputed material facts. Local Rule 56.1B(2) provides,

> The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material

[2] This finding is in keeping with Plaintiff's counsel's statement during the July 17, 2003 motion hearing that the only issue in this action is whether the medical treatment provided to Plaintiff while incarcerated constituted deliberate indifference to a serious medical need.

> facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted

N.D. Ga. R 56B(2) (emphasis added). Plaintiff-respondent failed to comply with this rule, and instead, filed a pleading which stated, "The facts in this case are voluminous. Plaintiff incorporates the exhaustive facts alleged in his Complaint and in the Facts portion of his brief as if fully stated herein." (Plaintiff's Statement of Theory of Recovery and Material Facts As to which there are Genuine Issues at 2.) Thus, Plaintiff has failed to oppose any of Defendants' material facts, and all of Defendants' numbered facts are deemed admitted. See **Jackson v. City of Stone Mountain**, 232 F. Supp 2d 1337, 1341 (N.D. Ga. 2002). Nevertheless, the Court must still view all evidence and inferences of fact in the light most favorable to Plaintiff. **Adickes v. S.H. Kress & Co.**, 398 U.S. 144, 157 (1970). Accordingly, the Court has referenced the facts section of Plaintiff's response in an effort to determine the contentions put forth by Plaintiff.

The facts as are relevant to Plaintiff's claim of deliberate indifference are as follows. Plaintiff was arrested and booked into the GCDC on August 25, 2000, on two counts of aggravated child molestation. Upon being booked, Plaintiff was medically screened by a PHS nurse. During said screening Plaintiff indicated that he suffered from various medical problems including psoriasis, psoriatic arthritis, poor circulation, sleep apnea and asthma. Plaintiff also informed the nurse that he utilized prednisone (a steroid), aspirin, and a topical steroidal cream on a daily basis. Plaintiff has suffered from psoriasis and related conditions for all of his adult life. With treatment, Plaintiff has historically been able to manage these conditions into remission. Prior to his booking into GCDC, however, Plaintiff had experienced a flare-up of his psoriasis.

On the day following his booking, August 26, 2003, Plaintiff filed a medical request with the GCDC noting that

his psoriasis lesions had begun to bleed and that he was in need of his prednisone to prevent arthritic swelling in his joints. That same day, plaintiff's prednisone medication was delivered to the jail, and administration of the medication began. On August 29, Plaintiff's steroidal cream was delivered; Plaintiff was allowed to keep this medicine in his cell for use as needed.

From early-September until November 6. 2003, Plaintiff's condition steadily worsened with continued outbreaks of psoriasis, bleeding lesions, and joint swelling. During this period, Plaintiff was seen by PHS physicians on five occasions and attended to by PHS nurses numerous times. In an attempt to better monitor his condition, Plaintiff was placed in the GCDC medical unit for five days to allow for constant observation by the PHS nursing staff. At the recommendation of a PHS physician, plaintiff was taken to an off-site dermatologist where he was prescribed another steroidal ointment and other additional medication. In a further effort to assuage Plaintiff's worsening condition, Plaintiff was twice transported to his own rheumatologist who prescribed another treatment option and ordered an MRI to evaluate neck pain Plaintiff obtained through a fall at the jail. In accordance with his rheumatologist's orders, Plaintiff was taken to Emory Eastside Medical Center for an MRI.

Plaintiff had originally been denied bond, but based on his continued medical ailments, a second bond hearing was held before Gwinnett Superior Court Judge Debra Turner on November 6, 2000. At the hearing, the Court received testimony from Plaintiff's rheumatologist and Defendant Gebhardt. Plaintiff's doctor noted the condition of Plaintiff's psoriasis had deteriorated since his incarceration which in turn was causing an increase in Plaintiff's psoriatic arthritis and had resulted in a new lesion that was capable of causing severe spinal injury. It was also revealed that PHS inadvertently allowed Plaintiff to miss a follow-up appointment with the off-site dermatologist, and PHS had yet to perform blood work ordered three weeks prior to the

hearing. These findings and the GCDC's lack of bathtubs, warm baths represent an important part of the treatment of psoriasis, led the Judge to conclude that it was in Plaintiff's best interest to return home to care for himself. Accordingly, Plaintiff was granted bond.

Plaintiff's at-home care, however, did not last for an extended period. On November 16, 2000, Plaintiff was again booked in the GCDC for allegedly violating the provisions of his bond. The treatments Plaintiff had previously been receiving resumed within a day.

On November 27, 2000, Plaintiff was seen by the off-site dermatologist who had treated Plaintiff during his prior period of incarceration. The dermatologist recommended tri-weekly PUVA light treatments with Plaintiff's regular dermatologist in an effort to combat Plaintiff's psoriasis. Said treatments began on December 6, 2000 and continued every Monday, Wednesday, and Friday for the balance of Plaintiff's incarceration.

On December 1, 2000, Plaintiff's neck was allegedly injured in a security drill at the GCDC. [3] In response to his complaints, after noting no signs of external injury, PHS nurses treated Plaintiff with Tylenol and Motrin. A follow-up examination by a PHS physician led to a ten-day course of Motrin combined with a muscle relaxer.

In mid-December 2000, on the basis of Plaintiff's complaints that PHS allowed him to miss around twenty percent of his outside medical appointments and his general perception of inadequate medical care, Plaintiff's criminal attorneys requested that Judge Turner allow Plaintiff to schedule his own medical treatment. On December 18, 2000, plaintiff's request was granted. The judge's order left PHS with little involvement in Plaintiff's medical care beyond dispensation of his medications.

On December 27, 2000, plaintiff filled out an inmate request complaining that he was not receiving his breakfast

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[3] This incident gave rise to Plaintiff's assault claim which the Court has deemed to have been abandoned.

at the appropriate time for his medication schedule. Defendant Gebhardt responded in writing promising she would meet with GCDC administration on January 2, 2001. At the January 2 meeting, Gebhardt was assured that the problem would be resolved. On January 7, Gebhardt prepared a memorandum to GCDC staff outlining when plaintiff was to be fed in accordance with the requirements of his PUVA light treatments.

On January 24th, 2001, Plaintiff was released from the GCDC to go on house arrest.

III. Motions Relating to Summary Judgment

Subsequent to the filing of Defendant's motions for summary judgment, Plaintiff moved for oral argument on both motions for summary judgment. Defendants moved to strike both of Plaintiff's responses and specified exhibits attached thereto, and defendant Conway moved for leave to file a supplemental brief. Before turning to the question of summary judgment, the Court will address these related motions.

A. Plaintiff's Motions for Oral Argument

Plaintiff moved for oral argument with respect to both defense motions for summary judgment by filing two one-sentence motions simply requesting a hearing. By way of reply to Defendants' joint objections to his motions for oral argument, Plaintiff supported his request for a hearing by noting that six motions have been filed relating to summary judgment, and by further noting that Defendants elicited over three days of deposition testimony from Plaintiff, thereby creating an extensive factual record.

Local Rule 7.1E states, "Motions will be decided by the Court without oral hearing, unless a hearing is ordered by the Court." N.D. Ga. R. 7.1E. In the current matter, all necessary evidence is before the Court, and the Court is unpersuaded by Plaintiff's assertions regarding the need for oral argument. Consequently, Plaintiffs motions for oral argument are denied.

B. Defendants' Motions to Strike

Defendants Gwinnett County and Conway and Defendants PHS and Gebhardt each moved to strike Plaintiff's responses to their respective motions for summary judgment. In addition, Defendants Gwinnett County and Conway moved to strike four exhibits attached to Plaintiff's response. Defendants PHS and Gebhardt moved to strike one exhibit attached to Plaintiff's response.

1. Defendants Gwinnett County and Conway's Motion to Strike

Defendants move to strike Plaintiff's thirty-nine page response to their motion for summary judgment on the basis of its grossly exceeding the twenty-five page limit set by Local Rule 7.1D. Defendants ask this Court to exercise its discretion under local Rule 7.1F and decline to consider Plaintiff's response. Plaintiff concedes failure to comply with the Rule's page limitation and failure to seek leave of court for such noncompliance. Plaintiff attempts to justify his noncompliance based on an alleged voluminous factual record in this case.

The Court finds Plaintiff's justification wholly unpersuasive. The Local Rules are mandatory, and are in place to ensure a fair and just pretrial process. If the rather limited factual record in this case warranted departure from the Rules, the cases to which the Rules applied would be rare indeed. In an effort to decide this case on its merits, however, the Court declines to exercise its discretion to disregard Plaintiff's response.

Defendants also move to strike Exhibits 1, 2 and 3 attached to Plaintiff's response on the basis that said exhibits are not sworn, certified, authenticated or otherwise presented in compliance with Fwd. R. Civ. P. 56(e). Plaintiff counters that Exhibit 1, a set of undated, unidentified photographs of various human appendages presumably affected by psoriasis, was authenticated by PHS physician Mark Majoch, M.D., at deposition. Plaintiff's counsel, however, disavowed any attempt at authentication of the photographs at Majoch's

deposition, and Plaintiff offers no other method of authentication. Exhibits 2 and 3 are collections of unidentified documents. Plaintiff urges that the documents should not be stricken because Defendants authenticated these very same documents for use in their Motion for summary judgment. Plaintiff offers no support for a respondent's ability to rely on cross-authentication. Because Exhibits 1, 2, and 3 were not properly authenticated or verified as required by Fed. R. Civ. P 56(e), said exhibits are stricken from Plaintiff's response. **See Lugue v. Hercules, Inc**., 12 F.Supp 1351, 1355-56 (S.D. Ga. 1997)

Finally, Defendants move to strike Exhibit 4, the affidavit of Gerald Edward Blackford, Jr. Defendants assert Mr. Blackford's affidavit should be stricken because he was not identified as a witness in Plaintiff's response to Defendants' discovery requests or in Plaintiff's initial disclosures. Fed. R. Civ. P 26(a)(1)(A) requires a party to provide the opposing party with the name, address and telephone number of each individual likely to have discoverable information which may be used to support the disclosing party's claims or defenses. Mr. Blackford was an inmate at the GCDC during Plaintiff's incarceration at the facility. Plaintiff's counsel attempts to excuse the failure to disclose Mr. Blackwood based on the large number of inmates at the GCDC who may possess relevant information and Defendants' superior position to determine the identity of such inmates. This assertion alone is not sufficient to obviate counsel's duty to determine and disclose with due diligence what evidence supports Plaintiff's causes of action. Accordingly, Exhibit 4 is stricken.

For the reasons set forth above, Defendants Gwinnett County and Conway's motion to strike is denied in part, granted in part.

2. Defendants PHS and Gebhardt's Motion to Strike

Defendants move to strike both Plaintiff's response to their motion for summary judgment and the affidavit of Mr. Gerald Edward Blackford, Jr. Defendants' arguments for

striking said brief and affidavit are similar to those put forth in Defendants Gwinnett County and Conway's motion to strike. In keeping with its ruling on the prior motion to strike, the Court denies Defendants' motion to the extent it seeks to strike plaintiff's response, and grants Defendants' motion to the extent it seeks to strike Mr. Blackford's affidavit.

C. Defendant Conway's Motion for Leave to file Supplemental Brief

Defendant Conway seeks leave to file a supplemental brief in support of his motion for summary judgment. Local Rule 56.1A provides that supplemental briefs and materials shall not be considered on a motion for summary judgment except upon court order. N.D. Ga. R. 56.1A. Because the Court has before it the necessary and relevant evidence needed to rule on the issues presented for summary judgment, Defendant Conway's motion to file a supplemental brief is denied.

IV. Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail on the motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. **Celotex Corp. v. Cattrett**, 477 U.S. 317, 325 (1986). In ruling on Defendant's motions for summary judgment, the Court must view the evidence in a light most favorable to Plaintiff. **Adickes v. S.H. Kress & Co.**, 398 U.S. 144, 157 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" **Matsushita Electric Industrial Co. v. Zenith Radio Corp.**, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e).

As noted above, Plaintiff charges Defendants with deliberate indifference to his serious medical needs. In

support of his claim, Plaintiff attacks the method and quality of the treatment of his psoriasis and related conditions while incarcerated at the GCDC. Plaintiff asserts that his psoriasis lesions bled through both clothing and bed sheets without timely replacement of either. Plaintiff also complains of his inability to take warm baths, a treatment recommended by all dermatologists who saw him. Although the GCDC was not equipped with bathtubs, Plaintiff alleges that he should have been allowed to use the available baptismal pool for this purpose. Furthermore, Plaintiff points to a ten-day period between his arrival at the GCDC and his initial examination by a PHS physician as evidence of improper care. Upon his initial examination by the physician, who noted Plaintiff's was the worst case of psoriasis he had encountered, Plaintiff maintains he should have been immediately sent to a specialist.

Other evidence Plaintiff relies upon in support of his claim includes the lack of notes in Plaintiff's PHS medical files concerning his arthritic condition and joint swelling. Likewise, Plaintiff takes issue with PHS physicians' treatment of his neck pain as a muscular problem without having looked at Plaintiff's MRI, and despite their knowledge of his prior spinal condition. Plaintiff also notes PHS failed to secure his attendance at a follow-up appointment with the off-site dermatologist Plaintiff was originally referred to, and PHS was tardy in its completion of lab work ordered by Plaintiff's rheumatologist.

Plaintiff predicates his 42 U.S.C. Section 1983 claim for deliberate indifference on violation of his Eighth Amendment right to be free from the "unnecessary and wanton infliction of pain. "**Estelle v. Gamble**, 429 U.S. 97, 104 (1976). The Eighth Amendment, however, only protects individuals incarcerated subsequent to and because of a lawful conviction of a crime. **Hamm v. DeKalb County**, 774 F.2d 1567, 1572 (11th Cir. 1985). Conditions of confinement imposed on pretrial detainees such as Plaintiff are governed by the Fourteenth Amendment Due Process

Clause. Id. Nevertheless, for purposes of the Court's analysis, "the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." Id. At 1574. Therefore the Court will make use of the Eighth Amendment standard in analyzing Plaintiff's claim.

Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment proscription against "unnecessary and wanton infliction of pain." **Estelle** 429 US at 104. "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." **Farrow v. West**, 320 F.3d 1235, 1243 (11th Cir. 2003). A plaintiff must initially provide evidence of an objectively serious medical need. Id. Next, a plaintiff must prove that the prison official acted with "deliberate indifference" to the serious medical need. Id. Assuming without deciding that Plaintiff's psoriasis and related conditions represented a serious medical need, the Court finds Defendants did not act with deliberate indifference to such a need.

Deliberate indifference requires more than a finding of mere negligence. **Estelle** 429 U.S. at 106. Likewise, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." Id. The United States Supreme Court of Appeals for the Eleventh Circuit has characterized deliberate indifference as follows:

> '[A]n official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate. Alternatively, '[e]ven where medical care is ultimately provided, a prison official may nonetheless act with deliberate indifference by delaying the treatment of serious medical needs, even for a period of hours, though the reason for the delay and the nature of the medical need is relative in determining what type of delay is constitutionally intolerable. For example, a defendant who delays

necessary treatment for non-medical reasons may exhibit deliberate indifference.

Farrow, 320 F.3d at 1246 (citations omitted).

In the case at bar, it is clear that Plaintiff's condition greatly deteriorated from the time of his arrival at the GCDC until his release. It is also clear that defendants had a terribly difficult time treating Plaintiff's worsening condition. The evidence, however, does not support a finding that Defendants' actions rose to the constitutionally proscribed level of deliberate indifference. On the contrary, Plaintiff was seen by PHS physicians on seven occasions and by PHS nurses at least fifteen times in just under five months of confinement. Included in Plaintiff's treatment was a five-day stay in the GCDC medical unit for constant observation by medical staff. In addition to plaintiff's treatment at the GCDC, Plaintiff was transported to off-site specialists on over twenty occasions during this time. Included in these specialist visits were consultations with Plaintiff's own rheumatologist and dermatologist, and beginning in December 2000, tri-weekly PUVA light treatments.

There is no evidence that the missed appointments (Plaintiff estimates he was taken to only around eighty percent of his scheduled appointments) and tardy lab work of which Plaintiff complains were the result of anything more than negligence. Furthermore, many of Plaintiff's specific complaints relate to the quality of care he received rather than the lack of care. The absence of notes in Plaintiff's PHS medical files relating to Plaintiff's arthritis and PHS's treatment of Plaintiff's neck and back pain as a muscular condition rather than spinal injury both sound more in the nature of medical malpractice rather than conscious disregard or deliberate indifference to a known medical need. In the same vein, Plaintiff's allegation that he should have been allowed bathing time in the GCDC baptismal pool rather than the PHS physician-prescribed daily showering with Aveeno relates to modes of treatment, not lack of treatment. Plaintiff's charge that he was allowed to go

lengthy periods of time without replacement of bloody bed sheets and clothing, while quite troubling, does not in and of itself indicate a constitutional denial of medical care. In sum, the evidence does not support a finding that Defendants exhibited deliberate indifference toward Plaintiff's psoriasis and related conditions. **Compare Hamm**, 744 F.,2d at 1575 ("This evidence shows that [plaintiff] received significant medical care while at the jail. Although [plaintiff] may have desired different modes of treatment, the care the jail provided did not amount to deliberate indifference.") with **Farrow**, 320 F.3d at 1247 ("finding in case involving inmate whose lack of oral hygiene caused swollen, bleeding gums along with weight loss and malnutrition that the "substantial and inordinate [fifteen month] delay in treatment raises a jury question as to [defendant's] deliberate indifference toward [plaintiff's] serious medical need.").

Having found no deliberate indifference towards Plaintiff's medical care, the claim that Plaintiff was denied his due process rights under the Fourteenth Amendment fails. Without an underlying deprivation of this constitutional right, Plaintiff's 42 U.S.C. Section 1983 claim against each defendant fails as a matter of law. [4] Accordingly, both defense motions for summary judgment are granted.

V. Conclusion

For the reasons set forth above, Plaintiff's motions for oral argument on Defendants' motions for summary judgment (## 58, 59) are DENIED, Defendants Gwinnett County and Conway's motion to strike [#55] is DENIED in part, GRANTED in part, Defendants Prison Health Services and Gebhardt's motion to strike [#65] is DENIED in part, GRANTED in part, Defendant Conway's motion for leave to file supplemental brief [#73] is DENIED, Defendants Prison Health Services and Gebhardt's motion for summary judgment [#43] is GRANTED and Defendants Gwinnett

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[4] Although the standard for holding each Defendant liable under Section 1983 varies among Defendants, without an underlying constitutional violation there can be no Section 1983 liability.

County and Conway's motion for summary judgment [#46] is GRANTED.

SO ORDERED, this 5 day of March, 2004

/S/ ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE